2-1998

Recent Developments: A Review of New Cases, Legislation, & Regulations Affecting The Natural Resources Industries

Thomas A. Daily

RECENT DEVELOPMENTS

A REVIEW OF NEW CASES, LEGISLATION, & REGULATIONS AFFECTING THE NATURAL RESOURCES INDUSTRIES

Thomas A. Daily

RECENT DEVELOPMENTS—A REVIEW OF CASES, LEGISLATION, AND REGULATIONS AFFECTING THE NATURAL RESOURCES INDUSTRIES

By Thomas A. Daily[1]

ELEVENTH CIRCUIT RULES THAT EPA MUST REGULATE FRAC TREATMENTS.

The Safe Water Drinking Act ("SWDA")[2] requires the Environmental Protection Agency to promulgate regulations that set forth minimum requirements for state administered programs regulating underground injection of fluids. Among those minimum requirements is the requirement that the state must prohibit "any underground injection" unless authorized by permit or rule. EPA had previously ruled, however, that hydraulic fracturing of oil and gas wells did not constitute "underground injection of fluids" within the meaning of SWDA.

Relying upon this EPA determination, Alabama submitted an underground injection control program which did not deal with hydraulic fracturing. Legal Environmental Assistance Foundation, Inc. ("LEAF") petitioned EPA to withdraw its approval of Alabama's program because that program did not regulate hydraulic fracturing of certain methane gas wells. EPA, consistent with its prior definition of "underground injection," denied LEAF's petition.

LEAF then perfected a direct appeal to the United States Court of Appeals for the Eleventh Circuit.[3] The Court of Appeals ordered EPA to grant LEAF's petition and withdraw its approval of Alabama's underground injection control program. The appeals court found that the phrase "any underground injection" was unambiguous, and that EPA was without authority to make an exception,

---

[1]Member, Daily & Woods, P.L.L.C., 623 Garrison, Suite 600, Fort Smith, AR 72901

[2]42 U.S.C. §§300h-300h-8.

[3]Legal Environmental Assistance Foundation, Inc. v. EPA, 118 F.3d 1467 (11th Cir. 1997).

regardless of how much sense the exception might have made.

Presently this decision is only binding in the Eleventh Circuit, but, barring a rehearing in banc or appeal to the Supreme Court, it will stand. If EPA acquiesces in the decision EPA will begin requiring all states to regulate well completions which include hydraulic fracturing or acid treatments. The impact of all of this upon the natural resources industries cannot be accurately predicted at this time, but it can't be good. Perhaps the best solution would be to persuade Congress to grant specific exemptions from SDWA for these *de minimus* injections, particularly when they occur thousands of feet below fresh water aquifers.

TENTH CIRCUIT RULES THAT FEDERAL RESERVATION OF COAL IN LAND PATENT OF INDIAN TRIBAL LANDS RESERVED COALBED METHANE

The Southern Ute Indian Tribe is the successor in interest to the United States under Colorado lands patented with reservation to the United States of "all coal." These lands contain substantial production of coalbed methane gas. The Southern Ute Tribe sued Amoco and other producers for trespass, among other causes of action, for producing this gas without a lease from the Tribe. The producers had obtained leases from the owners of the oil and gas, as opposed to coal.

The case was certified as a class action defense, with Amoco acting as the designated class representative. The District Court granted summary judgment to the defendants.[4] On appeal, the Tenth Circuit Court of Appeals reversed.[5] The Appeals Court appeared persuaded that since coalbed methane was produced by the coalification process, it is simply a gaseous form of coal and thus had to fall within the reservation of "all coal." Also important was a rule of construction that reservations

---

[4]874 F. Supp. 1142 (D. Colo. 1995).

[5]Southern Ute Indian Tribe v. Amoco Production Co., 119 F.3d 816 (10th Cir. 1997).

in favor of the Federal Government are to be broadly construed. This is contrary to the rule that reservations by private grantors are construed narrowly.

The limited authority on this interesting question when it involved private parties is split. Courts in Alabama[6] and Pennsylvania[7] have sided with the coal owner, while the Montana Court[8] held for the gas owner. However, the Tenth Circuit Court expressed little interest in these cases, holding instead that the matter before it was one of federal law.

This case is disturbing. In 1981, the Solicitor of the Department of the Interior had promulgated an opinion entitled Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits[9] in which the Solicitor construed the meaning of "coal" in the 1909 and 1910 Acts which enabled the patents and concluded that "a reservation of 'coal' does not include coalbed gas."[10] Amoco and others had obviously relied upon this Solicitor's opinion in concluding that coalbed methane was the property of the owner of the gas, rather than the coal owner. The Tenth Circuit Court concluded that the Solicitor's opinion was not binding because it was apparently issued without

---

[6] NCNB Texas Nat'l Bank, N.A. v. West, 631 So. 2d 212 (Ala. 1993) (coal owner has ownership rights of CBM contained in coal and gas owner has rights to any CBM which has migrated away from the coal reservoir); Vines v. McKenzie Methane Corp., 619 So. 2d 1305 (Ala. 1993) (ownership of CBM was included in grant of "all coal"); Rayburn v. USX Corp., No. 85-G-2661-W, 1987 U.S. Dist. LEXIS 6920 (N.D. Ala. Jul. 28, 1987) (coal owner, USX, is owner of right to explore for and to extract occluded CBM where grantor of deed retained only oil and gas rights).

[7] United States Steel Corp. v. Hoge, 468 A.2d 1380 (Pa. 1983) (coal owner has right to CBM)

[8] Carbon County v. Union Reserve Coal Co., 898 P.2d 680 (Mont. 1995) (right to extract CBM is with holder of gas exploration rights).

[9] 88 Interior Dec. 538 (1981).

[10] Id. at 549.

notice to the tribes whose interests were affected. The real purpose of the Interior Solicitor's opinion was to enable the government to stake claim to coalbed methane under lands where the Government owned gas and someone else owned coal. Now, presumably, the government or the tribes may argue the issue either way, depending upon their interests in the particular case.

The lands in question underlay an Indian reservation in Colorado, so the problem seems remote. Unfortunately, it is not. Many very similar patents cover lands in Eastern Oklahoma where there has already been some coalbed methane production. Oklahoma is within the Tenth Circuit, so, presumably, those lands will be affected.

The Tenth Circuit Court of Appeals recently granted a rehearing *en banc* in the case.

ARKANSAS SUPREME COURT AFFIRMS CERTIFICATION OF ROYALTY OWNERS' SUIT AGAINST SEECO AS A CLASS ACTION.

SEECO, Inc. and Arkansas Western Gas Company are related corporate entities. Arkansas Western, a public utility, purchases gas from SEECO, a producer. One gas purchase contract between the parties is known as "Contract 59." Alan Hales and others are royalty owners whose lands are dedicated to Contract 59. They brought suit against SEECO for allegedly failing to enforce the contract against Arkansas Western, particularly with respect to its take or pay provisions. The named plaintiffs sought to proceed as a class. The circuit judge certified the class of royalty owners and SEECO appealed.[11]

The Arkansas Supreme Court affirmed the trial court's certification of the class. This result is unremarkable given the facts of the case. Indeed, Arkansas' most notorious take or pay case, Klein

[11] SEECO, Inc. v. Hales, 330 Ark. 402, ____ S.W.2d ____ (1997).

v. Arkoma Production Co.,[12] was tried as a class action. However, the court's opinion contains a detailed recitation of recent Arkansas decisions regarding class certification that attempts to reconcile apparently conflicting prior decisions and thus is likely to provide the basis for future decisions on class certification issues.

THREE CASES INVOLVE ALLEGATIONS THAT CENTRAL POINT COMPRESSOR STATIONS CONSTITUTE PRIVATE NUISANCE.

During 1997, at least three cases were tried which involved noise emitted from central point compressor stations in North Arkansas. In Neel v. Synoground[13] the issue was whether the Chancellor should rescind the sale of a home and surrounding three acres because of an alleged misrepresentation. The plaintiffs alleged that they were looking for a quiet home in the country and that Mrs. Synoground had represented to them that there was no noise problem of which she was aware. Also, the Synogrounds had answered "no" to the following question on a written property disclosure form used in connection with the transaction: "Are there any neighborhood noise problems or other nuisances that would not be normal for this type of property?"

The plaintiffs testified that immediately after moving into the home they discovered an "unbearable" roaring noise. Upon investigation they found its source, a central point compressor station located about 1,500 feet from the home. The Chancellor visited the site three times, twice alone. He concluded that the noise level at the home constituted, at worst, "an almost imperceptible hum." Thus, the complaint was dismissed with prejudice.

Three homeowners a few miles away who live quite close to another central point compressor

---

[12]73 F.3d 779 (8th Cir. 1996).

[13]Sebastian County Chancery Court Case No. E-96-266-G (II) (Greenwood District).

fared somewhat better in a jury trial in United States District Court.[14] The case involved a site containing two extremely large compressors which had been installed after the plaintiffs' homes had been built. One plaintiff couple's home was only about 300 feet away from the site, while others were somewhat farther away. The operator's testimony was that it had spent thousands of dollars muffling the noise but that, because of large fans required by the compressors, it was impossible to silence it altogether. The jury held that the compressor station constituted a nuisance as to three plaintiff couples. It awarded $55,000.00 to the couple living 300 feet away and $7,500.00 and $8,000.00, respectively, to two other couples living about one-half mile away. The jury awarded no damages to two other couples who live slightly farther away. No appeal was taken.

A jury returned a defense verdict in a case tried in Sebastian County Circuit Court which was affirmed by the Arkansas Court of Appeals in an unpublished opinion.[15] The facts were very similar to those in Cantrell v. Reynolds but the noise may not have been as great as at those plaintiffs' homes.

The jury instructions given in Cantrell v. Reynolds and Fitzgerald v. Southwestern Energy are very similar. The material instructions given in Cantrell v. Reynolds are as follows:

> Each of the plaintiffs seek to recover damages from the defendant on the theory that the noise produced by defendant's compressor(s) constitutes a nuisance and that as a result of the nuisance, the value of their property has been permanently diminished.
>
> In order to prove their case, each plaintiff has the burden of proving each of the following three (3) essential propositions by a preponderance of the evidence:
>
> First, that the compressor(s) operated by the defendant constitutes a nuisance;

---

[14]Cantrell, et al v. Reynolds Metals Company, U.S.D.C. Civil Case No. 96-2067 (W.D.Ark.).

[15]Roger Fitzgerald, et al v. Southwestern Energy Production Company, Case No. CA97-63 (Ark. Ct. App. 1997).

Second, that the nuisance is permanent; and

Third, that the operation of the compressor(s) has resulted in a permanent diminution in the fair market value of the plaintiffs' property.

Whether each of these three (3) essential propositions has been proven by a preponderance of the evidence is for you to determine.

An owner of an interest in land—including the lessee of a mineral interest—may use the property as long as the use does not unlawfully or unreasonably interfere with others. It is only the unreasonable use or conduct which results in unwarranted interference that constitutes a nuisance.

You are instructed that, under Arkansas law, a nuisance is defined as conduct by one landowner, or lessee, which unreasonably interferes with the use and enjoyment of the lands of another. A nuisance includes conduct on property which disturbs the peaceful, quiet, and undisturbed use and enjoyment of nearby property, but only where the resulting injury of nearby property and residents is certain, substantial, and beyond speculation and conjecture.

The mere diminution in value is not sufficient to establish a nuisance.

In determining whether any alleged nuisance is permanent in character, you should consider all of the evidence, including but not limited to:

the nature of the alleged nuisance;

the duration of the alleged nuisance from its inception down to the present time;

whether the alleged nuisance is reasonably certain to continue and, if so, for how long.

An owner of an interest in land—including the lessee of a mineral interest—may use leased property so long as the use does not unlawfully or unreasonably interfere with others.

You are instructed that the defendant is the lessee of the mineral interests underlying plaintiffs' property as well as the lessee of other mineral interests in the Gragg Field area. Accordingly, as lessee, defendant has an interest in the land and has the right to use the property of the plaintiffs and others in any manner reasonably necessary to perform the obligations of defendant's leases. This includes the right and obligation to explore, develop, and transport minerals under the land—including natural gas—and to construct and operate structures and facilities for the purpose of producing and marketing gas, including construction and operation of structures or facilities designed for the compression of natural gas.

Whether the defendant's operations unreasonably interfere with the use and enjoyment of the lands of another is for you to decide.

If you find from a preponderance of the evidence in this case that the operation of the compressor(s) constitutes a nuisance, and that the damage to the plaintiffs' property, if any, is permanent, then your verdict should be for an amount equal to the difference, if any, in the fair market value of plaintiffs' property immediately before and immediately after the commencement of the operation of the compressor(s), to the extent such difference was proximately caused by the operation of said compressor(s).

When I use the expression "fair market value," I mean the price that the plaintiffs' property would bring on the open market in a sale between a seller who is willing to sell and a buyer who is willing and able to buy after a reasonable opportunity for negotiations.

In determining the "fair market value" of plaintiffs' property, you are to consider the highest and best use of the land. However, the uses considered in fixing value must be so reasonably probable as to have an effect upon the market value of the land.

AOGC AND PSC DISPUTE JURISDICTION OVER "PRODUCTION" FACILITIES.

The Arkansas Natural Gas Pipeline Act of 1971[16] requires the Arkansas Public Service Commission (PSC) to regulate natural gas "gathering" in non-rural areas. Recently, the PSC's staff has adopted the position that such "gathering," at least in some instances, includes pipelines located behind the meter which is at the point where custody of the gas is transferred to a purchaser or transporter. Thus, PSC is now seeking to regulate activities of producers, in addition to transporters.

Producers argue that these upstream facilities are "production facilities" and exempt from PSC regulation. The Arkansas Oil and Gas Commission (AOGC) historically has thought it had jurisdiction over all phases of production of gas upstream from the transfer meter,[17] although only as a result of PSC's assertion of additional jurisdiction has AOGC sought to actively regulate pipelines and equipment used upstream from this meter.

On August 11, 1997, and August 13, 1997, PSC filed motions for show cause orders against Stephens Production Company[18] and Sonat Exploration Company[19] because, according to PSC, both were engaged in "gathering" gas pursuant to PSC jurisdiction. The facilities in question are pipelines connecting the wellheads of various wells (several in the city limits of Fort Smith) to separators, dehydrators and compressors, as well as to the custody transfer meter.

After hearings before the PSC, PSC ordered the parties to request the United States Department of Transportation (DOT) for an opinion as to whether DOT would consider PSC to

---

[16]A.C.A. §23-15-201-216.

[17]Pursuant to Act 105 of 1939 (A.C.A. §15-71-101 *et seq.*).

[18]PSC docket No. 97-315-U.

[19]PSC docket No. 97-321-U.

regulate such facilities in order to ensure DOT certification of PSC's pipeline safety plan under Section 5 of the Natural Gas Pipeline Safety Act of 1968. DOT has yet to respond.

This is an important and complex issue. Significant growth of Fort Smith and other Western Arkansas communities has caused the steady urban and suburban expansion into areas of gas production. New discoveries of gas have also recently been made in urban areas. Producers are concerned that overlapping agency jurisdiction will lead to unjustified red tape which will increase costs without benefits and, at worst, may lead to conflicting regulations. PSC appears proud of its new "jurisdiction" and unwilling to give it up. The solution is probably legislative, but the next regular session isn't until 1999, and a special session is highly unlikely, given the mutual dislike between the Governor and the Legislature.

BRINE CASE RESOLVES LIMITATIONS ISSUE; RAISES MANY OTHERS.

Great Lakes Chemical Corporation[20] produces Jurassic age salt water (brine) from the Reynolds Aquifer of the Smackover Limestone Formation underlying Southern Union County, Arkansas. Albemarle Corporation, Great Lakes' principal domestic competitor conducts a similar operation in neighboring Columbia County. The brine produced from these wells contains commercially valuable concentrations of bromine, in the form of dissolved bromide salts. Water from the production wells is piped to bromine extraction plants where elemental bromine is removed, using a process which involves infusing hot brine with steam containing chlorine. Both companies then either sell the elemental bromine or use it to manufacture other products which the companies

[20]and its subsidiary, Arkansas Chemicals, Inc.

market.[21] After the brine is processed to remove bromine, it is transported to disposal wells where it is reinjected back into the Smackover formation.[22] This combination of production and reinjection acts as a pressure maintenance system which has the effect of gradually sweeping high bromine brine away from injection wells toward production wells. Ultimately, "break through" will occur, and production wells will experience declines in bromide concentration, signaling the fact that they have begun to produce some of the reinjected "tail-brine." Since fluids move within the reservoir toward areas of relatively lower pressure all injected brine does not flow directly from injection wells toward production wells. Moreover, some of the brine which flows to production wells comes from directions other than that of the injection wells. Finally, the Smackover Formation is a geologically complex morass of interconnected porosity bars which are impossible to correlate over a large area.

These operations cover many thousand acres. While brine producers have long attempted to obtain leases authorizing their activities, some landowners simply refuse to lease. Is a brine producer liable to such an unleased owner on a theory such as trespass?

In 1979 the Arkansas Legislature enacted A.C.A. §15-76-301 *et. seq.*, authorizing the AOGC to form brine production units and integrate the interests of unleased owners therein. These units are required to contain at least 1,280 acres, underlain by a common aquifer. The brine producer is jurisdictionally required to control at least 75% of the acreage within its proposed unit.

This statute went virtually unused[23] until 1995 when Great Lakes, realizing a need to expand

---

[21]These products include flame retardant additives for plastics, agricultural pesticides, swimming pool water purifiers, photographic chemicals and pharmaceutical chemicals.

[22]Such reinjection is required by both EPA and AOGC.

[23]Albemarle's predecessor, Ethyl Corporation, did form two early brine units but neither involved injection wells.

its brine operations, began to unitize. Ultimately three units were formed,[24] over the opposition of Deltic Farm & Timber Co., Inc., then a subsidiary of Murphy Oil Corporation. Deltic owned several thousand acres which were leased to Great Lakes as well as several thousand unleased acres. Deltic challenged all three unitization orders in petitions for review filed in Union County Circuit court contending, among other things, that the unitization statute was unconstitutional. While these disputes were pending, Deltic sued Great Lakes in United States District Court.[25]

Deltic's Federal Court complaint alleges trespass and several trespass-equivalents. It also contained a prayer for cancellation of existing Deltic-to-Great Lakes leases.[26] The District Court granted Great Lakes' motion for partial summary judgment dismissing the lease-cancellation counts of the complaint.

Next, Great Lakes moved for partial summary judgment that Deltic's damages were limited by the Statute of Limitations[27] to those suffered within three years immediately preceding the filing of its complaint. Deltic claimed that it had just learned of Great Lakes' alleged violations of its lands and that it was entitled to the benefit of the so-called "discovery rule," which tolls limitations until the victim knew or reasonably should have known it was being wronged. The District Court agreed with Great Lakes. It rejected the idea that the discovery rule should apply and found, alternatively, that Deltic should have discovered its alleged cause of action anyway.

---

[24]BU1-95 (South Plant Unit); BU2-95 (Central Unit); BU3-95 (West Plant Unit).

[25]Deltic Farm & Timber Co., Inc. v. Great Lakes Chemical Corporation.

[26]Deltic's admitted purpose was to reduce Great Lakes' leasehold acreage within its West Plant Unit and thus prevent Great Lakes from securing the jurisdictionally required 75%.

[27]A.C.A. §16-56-105.

Deltic obtained leave of the Eighth Circuit Court of Appeals to take an unusual interlocutory appeal of the District Court's ruling on limitations. Then the Eighth Circuit Court affirmed the District Court, holding, as a matter of law, that Arkansas would not apply the discovery rule in a mineral trespass case.[28]

After three more Great Lakes' partial summary judgment motions were granted in part and denied in part, the case was tried to the District Court, sitting without a jury, in December, 1997. As of the submission deadline for this paper, the case remains under advisement, but a decision is expected soon. An appeal, if not appeal and cross-appeal, is virtually inevitable. A lot of money is involved. Also involved are several important issues of natural resources law:

DOES THE OWNER OF A MERE LEASEHOLD INTEREST HAVE A RIGHT TO SUE FOR MINERAL TRESPASS?

In Budd v. Ethyl Corporation[29] the Arkansas Supreme Court, citing Osborn v. Arkansas Territorial Oil Gas Co.,[30] refused to permit a brine lease owner to maintain an action for trespass:

> We think the chancellor was right in rejecting that contention. Here the issue turns upon the limited nature of a lessee's property rights, prior to his attainment of production. Quoting again from the Osborn case, supra: "A gas lease, such as is involved in this case, is a contract granting to the lessee the right to explore the land and to produce therefrom the gas therein discovered. It is not a present sale or transfer of title to the gas, but, on account of its vagrant nature, the gas does not become actually owned until actually possessed. As is said in the case of Williamson v. Jones, 39 W. Va. 231: 'The title is dependent on finding the gas by the purchaser in a limited time' and is inchoate." That thought was echoed in Pasteur v. Niswanger, 226 Ark. 486, 290 S.W.2d 852 (1956): "Our court has held that an oil and gas lease conveys an interest and easement in land itself, but no title passes until the oil and gas

---

[28]Deltic Farm & Timber Co., Inc. v. Great Lakes Chemical Corporation, ____ F.3d ____ (8th Cir. 1997).

[29]251 Ark. 639, 474 S.W.2d 411 (1971).

[30]103 Ark. 175, 146 S.W. 122 (1912).

are reduced to possession."[31]

Deltic argued, however, that the Arkansas Supreme Court had changed this rule by dicta in its opinion in Hillard v. Stephens Production Company[32] to the effect that the lessee of natural gas obtains ownership of gas in place. That dicta is clearly contrary to all other Arkansas law on this issue. The District Court has ruled in favor of Great Lakes, limiting Deltic's claims to lands upon which it held a fee interest.

TO WHAT EXTENT DOES THE RULE OF CAPTURE PERMIT CAPTURE FROM AND DISPLACEMENT OFF OF UNLEASED LANDS?

Arkansas' first "brine drainage" case was Budd v. Ethyl Corporation.[33] Budd had sued Ethyl for damages he allegedly sustained from Ethyl's production of brine displaced from his unleased lands. Budd owned minerals under 240 acres lying adjacent to, *but outside of,* the boundaries of Ethyl's recycling area, which consisted of production wells surrounded by a circle of injection wells. Budd sued Ethyl, asserting that Ethyl's recycling operation was unlawfully pushing bromine-rich brine off of his property, thereby causing him injury.

Relying on the rule of capture, the Arkansas Supreme Court rejected Budd's contention that the displacement of brine from beneath this tract of land by Ethyl's recovery process gave rise to a cause of action. In response to Budd's argument that he should be compensated for minerals displaced from underneath this nearby tract of land, the Arkansas Supreme Court stated:

> The complaint describes the appellees' recycling operation in substance as follows: The appellees have oil-gas-and-mineral leases upon a compact block of about 16,000

---

[31]Budd v. Ethyl Corporation, *supra,* 251 Ark. at 641-642.

[32]Hillard v. Stephens Production Co., 276 Ark. 545, 637 S.W.2d 581 (1982).

[33]*supra.*

acres of land. They have a number of input wells in what is roughly a circle near the outer edge of the block. They have a number of output wells within that circle. The appellees withdraw salt water from the inner wells, extract therefrom valuable minerals (one of which, according to the briefs, is bromine), and then forcibly inject the salt water into the input wells, which presumably facilitates the further withdrawal of salt water from the output wells.

The appellant asserts the invasion of two separate property interests, which must be discussed separately.

First, the appellant owns an undivided one thirty-sixth interest in the minerals in 240 acres lying next to, but outside of, the appellees' 16,000-acre block. The appellees do not have a lease upon the 240 acres in question. The appellant asserts that the recycling operation is actually draining salt water from the 240 acres and that the appellees should be made to account to him for his share of the minerals that are being extracted from the salt water.

That argument is refuted by the law of capture, which we hold to be applicable in this situation. That law was stated in our early case of Osborn v. Ark. Territorial Oil & Gas Co., 103 Ark. 175, 146 S.W. 122 (1912):

> Petroleum, gas and oil are substances of a peculiar character * * *. They belong to the owner of land, and are part of it so long as they are part of it or in it or subject to his control; but when they escape and go into other land or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas extending under his neighbor's field, so that it comes into his well, it becomes his property.

[Quoting Brown v. Spilman, 155 U.S. 665, 15 S.Ct. 245, 39 L.Ed. 304 (1895).]

Later cases are to the same effect.

The Arkansas Supreme Court thus concluded "that the law of capture prevents the [plaintiff] from maintaining his first asserted cause of action" for minerals drained from his land lying adjacent to, *but outside of*, the periphery of Ethyl's recycling area.

The second reported "brine drainage" case was a diversity case decided by the Eighth Circuit

Court of Appeals, Young v. Ethyl Corporation.[34] Young sued Ethyl for damages it allegedly caused as a result of its recycling operations. In contrast to Budd's land, Young's land was situated in the recycling area, *directly between* Ethyl's injection and production wells.

Specifically, Ethyl operated two production wells adjacent to the north and east of the Young's land, a production well located immediately to the north and west of Young's land, and an injection well located adjacent to and south of Young's land. It was undisputed that the injection of debrominated waters into the injection well south of Young's land recycled the brine in the formation underlying Young's land, forcing it to move to, and be recovered by, Ethyl's production wells located northeast and northwest of Young's land.

Relying on the decision of the Arkansas Supreme Court in Budd, the District Court had held that the rule of capture precluded Young's action against Ethyl. In reversing the district court's decision, the Court of Appeals held that there were significant factual distinctions between Budd and Young. In distinguishing these two cases, the Court of Appeals compared exactly where each particular tract of land was situated in relation to Ethyl's recycling area. The Court of Appeals distinguished the holding in Budd because Budd's land was *adjacent to, but outside of*, Ethyl's recycling area, whereas Young's land was located *directly within* Ethyl's recovery area. The court stated:

> In Budd, the plaintiff sought an accounting for bromides removed from beneath two nonadjacent tracts of land. The Arkansas Supreme Court treated the two tracts separately, dismissing the cause of action as to each tract for different reasons. The first tract considered by the court was a 240-acre tract in which Budd owned an undivided interest in the minerals. The court found that this 240-acre tract was outside of the recycling area, although adjacent to it. Relying on the rule of capture, the court rejected Budd's contention that the drainage of valuable minerals from

[34]521 F.2d 771 at 772, 773 (8th Cir. 1975).

beneath the tract stated a cause of action. ...

> Since Young's tract is within the recycling area, the state court's disposition of Budd's cause of action with respect to the 240-acre tract is not controlling.[35]

The Eighth Circuit Court of Appeals in Young thus took great pains to preserve the holding of the Budd decision. The court made it clear that its decision only applied to those lands that lie *within* the recycling area, *i.e.*, the area between the injection and production wells.

The third reported "brine drainage" case is the Arkansas Supreme Court's decision in Jameson v. Ethyl Corporation.[36] Ethyl had sued Jameson for declaratory judgment, seeking to establish the legality of its operations pursuant to the rule of capture. Jameson counterclaimed for damages and requested injunctive restraint of Ethyl's operations. Jameson's land was located *within* the area between Ethyl's injection wells and production wells. Ruling that the Arkansas Supreme Court's decision in Budd expressed the controlling law, the chancery court determined that the rule of capture was applicable to Ethyl's operations and, accordingly, dismissed Mrs. Jameson's counterclaim.

On appeal, the Arkansas Supreme Court held that the Budd decision was inapplicable to the facts presented by Mrs. Jameson. The court stated:

> In Budd v. Ethyl Corporation, supra, this Court had occasion to address the issue of whether Ethyl's operations in the Field which forcibly injected brine into input (injection) wells were entitled to the benefit of the rule of capture. As to a 240-acre tract lying next to but outside of Ethyl's 15,000 area block, this Court held that the rule of capture applied and that Ethyl was not obligated to account for any minerals which may have flowed as a result thereof into its wells from the 240-acre tract. However, as to a 40-acre tract lying within Ethyl's peripheral area of input (injection) wells, this Court concluded that a separate analysis was necessary. Because of the limited nature of the lessee's interest in the 40-acre tract within Ethyl's peripheral area of input wells and certain equities noted, this Court also rejected Budd's claim against

---

[35]Young v. Ethyl Corporation, *supra*, at 772-73 (emphasis added).

[36]271 Ark. 621, 609 S.W.2d 346 (1980).

> Ethyl concerning the 40-acre tract. Obviously, this Court would not have treated the encircled 40-acre tract differently if this Court had reached the decision in the Budd case that it was immaterial whether the lands were inside or outside of Ethyl's peripheral area of input wells.[37]

Thus, the Jameson decision preserved the holding in Budd that the rule of capture precluded recovery for alleged injury to lands lying *next to, but outside of*, the recycling area.

The District Court denied Great Lakes' motion for partial summary judgment limiting Deltic's recovery to damages suffered by Deltic on lands within the recycling area defined by Great Lakes' consulting engineer in his affidavit. The Court agreed with Deltic that the extent of the actionable area was a question of fact to be determined from the evidence. The matter is under advisement.

IS AN AOGC ORDER FORMING A PRODUCTION UNIT A *RES JUDICATA* BAR TO AN ACTION FOR INJURY TO LANDS OUTSIDE THE UNIT?

Deltic claimed that Great Lakes' operations have damaged its lands even lying outside Great Lakes' units. Copies of the orders of the Arkansas Oil and Gas Commission, finding specifically that Great Lakes' operations are contained within those units were offered into evidence at the trial. Indeed, the order which formed the West Plant Unit expressly rejected Deltic's request to include additional lands within that unit, finding that those lands had not been affected and were not in imminent danger of being affected in the future. Under Arkansas law those unitization orders can be *res judicata* bars to similar claims.[38]

The District Court refused to bar such Deltic claims on the basis of *res judicata*, but, when Deltic failed to produce evidence of any such injury, the matter became moot.

---

[37]Jameson v. Ethyl, *supra*, 271 Ark. at 627-28 (emphasis added).

[38]Katter v. Arkansas Louisiana Gas Co., 765 F.2d 730 (8th Cir. 1985).

WHAT IS THE PROPER MEASURE OF DAMAGES FOR WILLFUL MINERAL TRESPASS?

Young v. Ethyl was the subject of two appeals to the Eighth Circuit. The first, discussed above, dealt with Ethyl's liability to Young. Upon remand of the Young case, the District Court assessed damages. In so doing, the District Court found that Ethyl had relied in good faith upon its belief that the rule of capture protected it from liability. As a consequence, the District Court held that Ethyl had committed a trespass upon Young's land, but that that trespass was an innocent trespass, as opposed to a bad faith trespass. The District Court then proceeded to erroneously award to Young the value of all of the products which Ethyl had produced from the bromine within the brine removed from Young's land.

The Eighth Circuit Court of Appeals reversed again.[39] The Eighth Circuit affirmed the District Court's holding that Ethyl's trespass was not in bad faith. However, it reversed the District Court's ruling that damages should be based upon bromine and secondary and tertiary bromine products. Instead, the Court of Appeals specifically held that brine is a mineral under Arkansas law and that the measure of damages for a good faith trespass to brine must be based upon the value of the brine in the ground. The value of brine in the ground can be measured either by taking their value at the well head and subtracting the costs of extracting them or, if the court determines that the victim of the trespass would not have been a participant in the well, then a fair royalty.

Great Lakes contends that it acted in good faith. Deltic disputes that contention. All parties do appear to agree that the rule of Young v. Ethyl discussed above sets the measure of damages if the court finds Great Lakes to have acted in good faith. However, if Great Lakes is found to have acted in bad faith, Deltic contends that it is entitled to damages based upon the value of elemental

---

[39]Young v. Ethyl, 581 F.2d 715 (8th Cir. 1978).

bromine rather than brine at the well head. Great Lakes, on the other hand, argues that even bad faith damages should be limited to those based upon the well head value of brine without allowance for the cost of bringing the brine to the well head.

Great Lakes' legal argument in this regard is based upon the following excerpt from the Eighth Circuit's second Young opinion:

> National Land and Arkansas Supreme Court cases indicate that if the taking is willful and in bad faith the measure of damages if the value at the well head without deducting any costs of bringing the mineral to the surface. Thus even under the bad faith rule using the maximum surface value of five cents per barrel, the total damages would approximate $380,000.[40]

Deltic contends that the above-quoted language was dicta because the Young appeal had involved a good faith trespass. The District Court denied Great Lakes' motion for partial summary judgment on this issue. The actual amount of damages, if any, is under advisement.

Deltic also contended that it was entitled to recover punitive damages in addition to bad faith damages. The trial court did grant Great Lakes' motion for partial summary judgment on that issue, holding that bad faith trespass damages were a form of punitive damages which precluded an award of additional punitive damages.

---

[40] *Id.* at 719.